EXHIBIT B

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of COLLEGE FOOTBALL ASSOCIATION, an unincorporated association, and CAPITAL CITIES/ABC, INC., a corporation.	DOCKET NO. 9242

To: The Honorable James P. Timony
Administrative Law Judge

COMPLAINT COUNSEL'S NONBINDING STATEMENT

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COMPLAINT COUNSEL'S NONBINDING STATEMENT

Pursuant to Section 3.21(a) of the Commission's Rules of Practice, complaint counsel submit this nonbinding statement, setting forth the issues to be tried, what the evidence will prove and the legal theory establishing respondents' violation of Section 5 of the Federal Trade Commission Act ("FTC Act"), as amended, 15 U.S.C. § 45.[1]

I. INTRODUCTION

The Commission's complaint ("Complaint"), issued September 5, 1990, charges respondents, the College Football Association ("CFA") and Capital Cities/ABC, Inc. ("Capital Cities"), with violating Section 5 of the FTC Act through agreements that

[1] Rule 3.21(a) requires the parties to file nonbinding statements to help expedite discovery and narrow the issues to be tried. However, this statement is not intended to substitute for a pretrial brief.

illegally restrict competition in the marketing of college football telecasts.

In 1984, the Supreme Court invalidated the football telecast agreements that the National Collegiate Athletic Association ("NCAA") had undertaken to implement its joint marketing plan for its members. NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. 85 (1984)("Board of Regents"). The Court found that the NCAA plan was a horizontal cartel among the members of the NCAA which restricted the price and output of college football telecasts and interfered with consumer preference. Id. at 104-07. Ruling that there was no adequate justification for these anticompetitive features (id. at 113-20), the Court condemned the NCAA plan as an unreasonable restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Id. at 88.

Subsequently, the CFA, acting on behalf of its membership -- which includes most of the nation's major college-football-playing institutions -- has entered into restrictive telecast agreements, much like those condemned in Board of Regents. The Complaint charges that, by entering these telecast agreements, the CFA, through collusion with and among its members, has unreasonably restricted competition. The Complaint also charges that, through its participation in certain of these telecast agreements, Capital Cities has colluded with the CFA to restrict competition unreasonably.

The evidence in this case will show that respondents' telecast agreements have the same anticompetitive features as the agreements condemned in Board of Regents.[2] That is, the agreements restrict pricing, reduce output and subvert viewer choice.[3] The evidence will show that respondents' efficiency claims are unfounded and unpersuasive. As a result, under the Commission's truncated rule-of-reason analysis, respondents have violated Section 5 of the FTC Act.[4]

II. THE PARTIES

A. CFA

The CFA is an unincorporated association, with its principal place of business in Boulder, Colorado. The CFA's 66 members are most of the major college football schools in the country.[5] It consists of the members of five major football conferences -- the Southwest Athletic Conference, the Atlantic Coast Conference, the

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[2] Indeed, one court has indicated, in dicta, that the challenged agreements are subject to the per se rule. Board of Regents of the Univ. of Calif. v. ABC, Inc., 747 F.2d 511, 517-18 (1984).

[3] In fact, the evidence will show that the CFA has substantial market power and that the challenged agreements have caused competitive harm.

[4] Restraints of trade that violate Section 1 of the Sherman Act, are "unfair methods of competition" under Section 5 of the FTC Act. FTC v. Cement Institute, 333 U.S. 683, 694 (1948).

[5] The NCAA divides its members into three groups (Divisions I, II an III) according to the size and diversity of each institution's athletic program. For football only, Division I is further subdivided into Divisions I-A and I-AA. Division I-A members (106 schools) have the most prominent and nationally recognized programs and are the most in demand for television appearances. The 66 members of the CFA are all Division I-A schools.

Western Athletic Conference, the Southeastern Conference, and the Big Eight Conference -- and 20 prominent independent schools.

The CFA was originally formed in 1977 to lobby and promote the interests of major football playing schools within the NCAA. Subsequently, much of its activities have involved gaining and maintaining control over football telecasts.[6]

Since 1984, the CFA has negotiated multi-year, multi-million dollar telecast agreements with national telecasters on behalf of those members that participate in the television plan.[7] Beginning in 1991, the CFA has five-year contractual commitments with ABC and ESPN that will generate $60 million a year in rights fees to be shared by participating CFA schools.

B. Capital Cities

Capital Cities is a New York corporation, headquartered in New York City, and is engaged in television and radio broadcasting and publishing. In 1989, Capital Cities reported earnings of $485.7 million on revenues of $4.96 billion.

Capital Cities owns and operates the ABC Television Network ("ABC"), which is one of the three major over-the-air television networks, and consists of daytime and prime time programming, including ABC News and ABC Sports.

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[6] It encouraged and partially financed the lawsuit by two of its members that culminated in the Board of Regents decision. Over the years, the CFA has made extended efforts to persuade the Big Ten and Pac-10 Conferences to join with it in forming a single telecast marketing organization for major college football.

[7] Currently, 64 members of the CFA are eligible to participate in the plan.

ABC has televised college football every year since 1966. It currently has national telecast agreements with the Big Ten/Pac-10 consortium,[8] covering the 1987-96 seasons and an agreement with the CFA for the 1991-95 seasons.

Capital Cities also televises college football on national cable television. It owns 80% of ESPN, the 24-hour sports cable network. Currently, ESPN has separate cable telecast rights agreements with three conferences -- the Ivy League, the Pac-10 and the Big Ten -- and with the CFA.

III. THE COMMISSION HAS JURISDICTION OVER THE CFA

The CFA alleges that it is not a "corporation" within the meaning of Section 4 of the FTC Act and therefore is not subject to the Commission's jurisdiction. CFA's Answer ¶ 12. However, the evidence will show that the CFA, although nominally a nonprofit association, is indeed a corporation for purposes of the FTC Act.

The Commission has held that a nonprofit organization is a corporation under Section 4 provided only that:

> [(1) the organization's] activities engender a pecuniary benefit to its members; [and]
>
> [(2)] that activity is a substantial part of the total activities of the organization, rather than merely incidental to some non-commercial activity.

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[8] The Big Ten and Pac-10 Conferences jointly sell the national telecast rights to their members' home games much like the CFA does.

American Medical Association, 94 F.T.C. 701, 983 (1979), enforced as modified, 638 F.2d 443, 448 (2d Cir. 1980), aff'd by an equally divided Court, 455 U.S. 676 (1982)("AMA").

The CFA comes within this jurisdictional test as a substantial part of the its activities generate financial benefits for its members. While the association members in AMA were natural persons, the CFA's members, in most instances, are state universities and therefore state agencies, which are considered "persons" under the antitrust laws.[9]

IV. THE COLLEGE FOOTBALL TELECAST INDUSTRY

A. Before Board of Regents

The first televised college football game occurred in 1938, and for the next 14 years, schools made their own television contracts. Beginning with the 1952 season, the NCAA assumed near total control over college football telecasts.

During the period of the NCAA's control (1952-83), NCAA members -- by majority vote -- agreed not to televise outside the NCAA television plan.[10] At the time it was invalidated by the

[9] The Supreme Court has held that local governments, as agents of the state, are persons within the meaning of the Sherman, Clayton and Robinson-Patman Acts. Jefferson County Pharmaceutical Association v. Abbott Laboratories, 460 U.S. 150, 155-56 (1983); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 394-97 (1978)) The Commission has held that state agencies are also persons for the purposes of the FTC Act. Mass. Board, 110 F.T.C. at 608-09.

[10] As the Supreme Court subsequently held, by participating in the association, the NCAA members effectively agreed upon the restraints imposed by the association. 468 U.S. at 99.

Supreme Court, the NCAA plan allowed two series of network telecasts (which were carried by ABC and CBS), a national cablecast series (on the Turner Broadcasting System) plus certain limited local "exception telecasts."

In accordance with its plan, the NCAA designated the number of "exposures" of NCAA football that each of the three sponsored telecasters could broadcast.[11] The NCAA also limited the number of football games that each telecaster could show. It negotiated the rights fees, thus preventing price competition among individual schools.[12] It created separate, exclusive time periods for each telecast series.[13] The NCAA employed "appearance requirements" that compelled each network to televise

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[11] An "exposure" is the actual telecast time (approximately three hours) in which a telecaster shows a game or games. For example, a network exposure could involve one game shown nationwide or a number of games aired simultaneously to different segments of the country. Consequently, the number of games that a telecaster airs during an exposure has no effect on the football-viewing options available to the fans in any area.

[12] In fact, the NCAA established a uniform price schedule with one price for national telecasts, another, lesser price for regional telecasts, and still lower prices for Divisions II and III games. As the Supreme Court noted, the price a team was paid was not affected by "the size of the viewing audience, the number of markets in which the game [was] telecast, or the particular characteristic of the game or the participating teams." 468 U.S. at 93.

[13] The NCAA created exclusive time periods by controlling the telecast start times. For example, on those Saturdays in which all three sponsored series were aired, subject to minor permitted scheduling adjustments, one network had to begin its telecast between 12:20 and 12:35 p.m. Eastern Time, the other network telecast began between 3:45 and 3:50 p.m. and the cable telecast began no earlier than 7:00 p.m.

a minimum number of different schools.[14] It also used "appearance limitations" that limited the frequency with which any school could appear on a telecast series.[15] It even designated the number of commercial minutes permitted in each telecast.

Finally, games excluded from the three NCAA telecast series could only be televised under highly restricted circumstances. In fact, the major football schools could not show such games beyond their home markets and then only under certain conditions.[16]

B. After Board of Regents

In the wake of Board of Regents, there has been an increase in the amount of college football on television. Schools have used a variety of approaches to market the telecast rights to their football games. Individual schools have sold games

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[14] The NCAA also required the networks to televise a minimum number of schools from Divisions I-AA, II and III.

[15] Over the years, the NCAA plan was refined to allow for modest increases in the telecast opportunities for its members. The plan expanded from one network to two networks and ultimately two networks and a cablecaster. The limitation on a member's network appearances was increased from one per year to six over two years. The format of exclusively national telecasts was abandoned in favor of a mix of national and regional telecasts. Exception telecasts were also expanded.

[16] Under the so-called "exception telecasts" provisions of the NCAA plan, Division I schools could televise their games in their home markets provided the games were sold out and no "appreciable damage" would result to attendance at any other games played in the same geographic area at the time of the telecasts. Division II and III schools could televise any of their games in competition with NCAA sponsored telecasts but on no more than five stations.

directly to telecasters. In some instances, schools belonging to an athletic conference have sold their games jointly in the format of a conference series. The schools that make up the Big Ten and Pac-10 Conferences have combined to sell games as have the members of the CFA.[17]

The increased television exposure of college football, however, has been significantly limited by CFA-imposed restraints. The manner in which the CFA sells its members' games has much in common with the process used by the NCAA before it. Like the NCAA, the CFA uses a television plan. The CFA plan permits one network telecast series and one national cable series, with certain additional, albeit restricted, telecast opportunities for its members.

The plan and agreements determine the amount of CFA football (i.e., the number of exposures) available on network television and restrict that network exposure to a single network.[18] The plan and agreements limit the number of CFA games on network television. Similarly, there is a limit set on both the amount of air time devoted to CFA football and the number of CFA games

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[17] In December of this year, the CFA will complete the final year of four-year contracts with CBS and ESPN, while the Big Ten/Pac-10 consortium has a contract, running through 1996, with ABC. Sixty-three CFA schools have agreed to contract with ABC and ESPN for the 1991-95 seasons. One CFA school, Notre Dame, recently signed a separate television agreement with NBC for the 1991-95 seasons.

[18] The terms "CFA football" and "CFA games" refer to those football games in which at least the home team is a member of the CFA. Generally, telecast rights are marketed by the home team, although the visiting team's consent is necessary for a game to be televised.

aired by the CFA cable telecaster. The CFA negotiates the rights fees for the games it markets, preventing price competition for such telecasts.[19] All the challenged telecast agreements provide for time period exclusivity, restricting national and regional telecasts of CFA football during the viewing hours assigned to the CFA's sponsored telecasters.[20] The agreements also employ appearance requirements and appearance limitations, and designate the number of commercial minutes permitted in each sponsored telecast.

As a result, on a typical Saturday during football season, there is only one network telecast of a CFA game, and that game is shown during the late afternoon hours. Two CFA games are shown on national cable, by ESPN, one in the late afternoon and one in the evening. In general, all other telecasts of CFA games are relegated to local and regional broadcasts, and then, are permitted only during the early afternoon.

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[19] Starting with the lump sum received from its two exclusive telecast series, the CFA sets aside 20-25% to be divided equally among all participating members. The CFA allocates the remaining 75-80% into uniform rights fees: one price for network national telecasts, another price for network regional telecasts and other prices for national and regional cable telecasts.

[20] Under the CFA plan, the late Saturday afternoon and evening hours are largely reserved for the CFA's network and cable series. With limited exceptions, CFA home games not selected for telecast in one of the two CFA-sponsored series can not be televised if the kick off occurs later than 12:10 p.m. local time (12:40 Eastern Time for SEC games). The limited exceptions to this time period exclusivity involve local "home market" telecasts, certain pay-per-view telecasts and closed circuit telecasts to campus and alumni locations.

V. CFA HAS VIOLATED SECTION 5

A. Board of Regents

Analysis of the challenged telecast agreements must start with Board of Regents. The Supreme Court found that the NCAA controls were designed to limit the amount of televised college football. The Court affirmed the district court's conclusion that the NCAA controls are those of a "classic cartel," which, by limiting output, achieved an artificially high price for the games covered by the plan. 468 U.S. at 96. As explained by the district court:

> Indeed, this horizontal agreement to limit the availability of games to potential broadcasters is the very essence of NCAA's agreements with the networks . . . . [T]he networks are actually paying the large fees because NCAA agrees to limit production . . . . Because the NCAA limits production, the networks need not fear that their broadcasts will have to compete head-to-head with other college football telecasts . . . .

Id. at 105 n.29 (citation omitted).

The Court also found that the uniform prices produced by the NCAA controls were unresponsive to free market demand. The Court agreed with the district court that:

> Because of the NCAA controls, the price which is paid for the right to televise any particular game is responsive neither to the relative quality of the teams playing the game nor to viewer preference.
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> In a competitive market, ... prices would vary for the games . . . . [T]he price which the telecaster would pay for a particular game would be dependent on the expected size of the viewing audience. Clearly, the NCAA controls grossly distort the prices actually paid for an individual game from that to be expected in a free market.

Id. at 106 n.30 (citation omitted).

Stressing that the Sherman Act is a "consumer welfare prescription," the Court explained that preserving the competitive influence of consumer preference is a "fundamental goal of antitrust law." Id. at 107. Consequently, "[p]erhaps the most pernicious aspect [of the NCAA plan] is that under the controls, the market is not responsive to viewer preference." Id. at 107 n.34 (citation omitted).

Having readily identified the anticompetitive character of the NCAA controls, the Court indicated that actual proof of market power in some precisely defined product market would not be necessary to find the controls unreasonable.[21] In fact, the Court stated it would invalidate the NCAA controls, absent proof of their countervailing competitive virtues, which it was the NCAA's "heavy burden" to establish. Id. at 113.

In attempting to establish that its television controls were procompetitive, the NCAA asserted that its joint selling arrangement -- like that upheld in Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979)("BMI") -- made possible a new product, by reaping otherwise unattainable efficiencies. The NCAA also claimed that its plan was a

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21 The Court concluded that, even if the NCAA had no market power (which it did), "the absence of proof of market power does not justify a naked restriction on price or output." 468 U.S. at 109. Such a restriction can be adjudged unlawful without "extensive market analysis." Id. at 110 n.42 (quoting from Amicus Curiae Brief for United States, joined by the Federal Trade Commission, at 20 ("DOJ/FTC Amicus Brief")).

legitimate method for maintaining competitive balance in college football.[22] The Supreme Court rejected both arguments.

1. The BMI Claim

In BMI, the Supreme Court upheld a joint selling arrangement among musical composers which was found to increase the volume of compositions sold in the market. The collective action created a new product because it "made a market in which individual composers are inherently unable to compete fully effectively." 441 U.S. at 23.

In Board of Regents, the NCAA argued that it likewise created a new product -- an attractive series of games far superior to anything schools could market individually. NCAA's Brief before the Supreme Court at 23-24, Board of Regents. According to the NCAA, its package sale "enhance[d] the scope of the networks' choice," permitted the "last-minute selection of exciting games [that] could not easily be arranged" otherwise[23] and "reduce[d] the costs of creating the series." Id.

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[22] The NCAA also claimed that its plan was intended to protect live gate attendance at college football games. The Court rejected that justification as a matter of law, reasoning that it assumes "ticket sales ... are unable to compete in a free market" (468 U.S. at 116) which is "inconsistent with the basic policy of the Sherman Act." Id. at 117. See National Society of Professional Engineers v. United States, 435 U.S. 679, 695 (1978)(policy underlying Sherman Act "precludes inquiry into the question whether competition is good or bad").

[23] As the NCAA explained its package sale arrangements, "networks may choose any game (often not until five or six days before telecasting); they look at each week's performances to pick the games that seem most likely to be exciting." NCAA's Brief before the Supreme Court at 23, Board of Regents. The NCAA argued that "in the absence of the NCAA's arrangements, . . . games would be sold to TV in advance of the season." Id.

However, the Supreme Court rejected the NCAA's BMI argument. 468 U.S. at 114-15. In so doing, the Court affirmed the district court's ruling that:

> There can be no doubt that the package offered by NCAA is more attractive to the networks than that which any individual college could offer. However, that fact does not bring this case within the rule of Broadcast Music. The arrangement in Broadcast Music was found not only to be the most attractive means of marketing copyrighted compositions, but a necessary means of marketing that product. The Court found that without the type of licensing arrangement which the defendant had developed, the copyrighted property of member composers was practically valueless.
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> That is simply not true of the right to broadcast college football . . . . [U]nlike the licensing arrangement in Broadcast Music, the NCAA controls are not necessary for effective marketing of the product.

546 F.Supp. at 1307 (emphasis in original).

Quoting from the district court opinion, the Court stated, "The colleges are clearly able to negotiate agreements with whatever broadcasters they choose. We are not dealing with tens of thousands of relatively brief musical works, but with threehour football games played eleven times each year."[24] 468 U.S. at 114 n.53 (citation omitted).

Moreover, the Court held that the NCAA's joint sales arrangement could not meet the BMI standard because of the restrictions the NCAA placed on the competitive activities of individual schools.[25] As the Court noted, the saving grace of the joint selling arrangement in BMI was that "each individual [composer] remained free to sell his own music without restraint." Id. at 114.

2. The Competitive Balance Claim

The Supreme Court recognized that maintaining competitive balance among amateur athletic teams is a legitimate interest, but not one that justified the NCAA television controls.

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[24] One way in which telecast rights to the games could be sold in a free market was identified by the Commission, joining as amicus with the Justice Department in Board of Regents:

> [T]here is no reason to believe, as the NCAA contends, that in a competitive market games would have to be sold in advance of the football season, preventing networks from having flexibility in choosing the most interesting games for their "game of week" series. Schools are eager for the exposure of national television. There is every reason to believe, therefore, that schools, in entering into local or regional television sale contracts, would reserve the right to appear on a national network, if chosen.

DOJ/FTC Amicus Brief at 25, Board of Regents.

[25] The Court observed that the freedom of individual joint venture members to increase output "has been viewed as central in evaluating the competitive character" of the venture. 468 U.S. at 114 n.54.

First, the Court observed that the NCAA was not claiming that its television plan equalized competition within any single league. The NCAA simply could not point to a "readily identifiable group of competitors" who are being balanced. 468 U.S. at 118. Next, the Court stated that

> [t]he television plan is not even arguably tailored to serve [a balancing function]. It does not regulate the amount of money that any college may spend on its football program, nor the way in which the colleges may use the revenues that are generated by their football programs, whether derived from the sale of television rights, the sale of tickets, or the sale of concessions or program advertising.

Id. at 119.

The Court agreed with the District Court finding that other restrictions imposed by the NCAA designed to preserve amateurism were "'clearly sufficient' to preserve competitive balance to the extent it is within the NCAA's power to do so." Id.

Finally, the Court noted that competitive balance is viewed as a procompetitive justification under a rule of reason precisely because equal competition will maximize consumer demand for the product; here, to the contrary, the restraints limited output. Id. at 119-20.

B. The Commission's Truncated Rule-of-Reason Analysis

Applying the Supreme Court's recent pronouncements in Board of Regents and BMI, the Commission has adopted a three-step inquiry, that has been referred to as a truncated rule-of-reason analysis. Massachusetts Board of Registration in Optometry, 110 F.T.C. 549, 602-04 (1988)("Mass. Board").

First, is the challenged restraint "inherently suspect," i.e., "the kind that appears likely, absent an efficiency justification, to 'restrict competition and reduce output'?" Id. at 604. Second, if inherently suspect, is there a plausible efficiency justification for the restraint? Third, if a plausible efficiency justification is raised, is it "really valid?"[26] When the proffered efficiency justifications are either implausible or, upon examination, found invalid, the restraint is condemned "under the rule of reason without further inquiry . . . ." Id.

C. **Respondents' Inherently Suspect Agreements**

On their face, the challenged telecast agreements impose price restraints and restrictions on output and therefore are inherently suspect. Indeed, that the telecast agreements restrict competition and are inherently suspect cannot seriously be questioned.

By jointly negotiating the prices of all CFA games shown on network television and virtually all on late Saturday afternoon and evening cablecasts, the CFA imposes horizontal price restrictions which "always or almost always tend to restrict

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[26] Moreover, for a justification to be really valid, the defendant must show that the restraint is "reasonably necessary and narrowly tailored to achieve the procompetitive goal." Mass. Board, 110 F.T.C. 549, 587 (I.D. 1986)(citing American Medical Ass'n, 94 F.T.C. 701, 1009-10 (1979)), aff'd, 110 F.T.C. 598 (1988). See DOJ/FTC Amicus Brief at 28-30, Board of Regents; Silver v. New York Stock Exchange, 373 U.S. 341, 361 (1963); NFL v. North American Soccer League, 459 U.S. 1074, 1080 (1982)(Rehnquist, J., dissenting from denial of cert.) (anticompetitive practices must "be narrowly drawn to vindicate the legitimate interests").

competition and reduce output."[27] BMI, 441 U.S. at 20. Accord Mass. Board, 110 F.T.C. at 606.

Key limitations in the challenged agreements severely restrict the freedom of schools to compete during late afternoon and evening hours on Saturdays. As the Commission has recognized, an agreement among competitors limiting their hours of competition is a restriction on output and therefore inherently suspect. Detroit Auto Dealers Ass'n. Inc., Trade Reg. Rep. (CCH) ¶ 22,653 (Feb. 22, 1989), appeal pending, Nos. 89-3389 -3392 (6th Cir.).

Moreover, some restrictions in the challenged agreements (e.g., the limit on the number of a member's appearances on the CFA-sponsored series and the geographic restrictions on independent telecasts during key Saturday viewing hours) are market divisions which the Commission considers inherently suspect. Mass. Board, 110 F.T.C. at 604.

Then too, the challenged agreements have been directly characterized as restricting competition. The dissent in Board of Regents cautioned that, "[t]o the extent that its plan

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[27] Indeed, the courts and the Commission generally treat a restraint on price competition as per se illegal. See Arizona v. Maricopa County Medical Society, 457 U.S. 332, 349-51 (1982); Superior Court Trial Lawyers Ass'n., 107 F.T.C. 510, 572-75 (1986), remanded, 856 F.2d 226 (D.C. Cir. 1988), rev'd, 110 S.Ct. 768 (1990).

Concededly, agreements among competitors about prices are saved from the per se category "where the agreement on price is necessary to market the product at all." BMI, 441 U.S. at 23. However, as the Supreme Court held in Board of Regents, the marketing of telecast rights to football games does not require such cooperation among competitors.

contains features similar to those condemned as anticompetitive by the Court, the CFA may well have antitrust problems of its own." 468 U.S. at 127 n.2 (White, J., dissenting). In Regents of the Univ. of Calif. v. ABC, Inc., 747 F.2d 511, 518 (9th Cir. 1984), the Ninth Circuit upheld an injunction against the CFA's crossover restriction as an "intentional reduction in output," adding that "this conclusion applies with as much force to the ABC-CFA contract considered as a whole . . . ."[28] Thus, Commission and judicial precedent confirm that the challenged agreements must be considered inherently suspect.

D. Respondents' Flawed Efficiency Claims

Therefore, respondents will be put to the task of justifying their deviation from the operation of a free market. We believe that the explanations proffered by respondents will be found wanting, particularly when considered in light of the Supreme Court's analysis in Board of Regents. In the course of the pre-complaint investigation in this case, the respondents advanced several justifications for the restraints in their telecast agreements, including a BMI claim, competitive balance, increased viewership of college football, reduced transaction costs and increased ratings. However, none of these proffered justifications is valid.

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[28] The crossover restriction enjoined in Regents of Univ. of Calif., was a provision that the CFA and ABC adopted to increase the value of their contract by reducing the amount of attractive games available to other networks. Specifically, the crossover restriction barred other networks from televising any game played by CFA schools, including games with non-CFA opponents -- the so-called crossover games.

1. **The BMI Claim**

The respondents claim that the coordinated activity of the CFA's members makes possible the marketing of a new, package product much like the blanket licenses upheld in BMI. They argue that the CFA package sale is needed to televise a season-long series of games that includes the most attractive games to develop during the course of the season.

However, respondents' package argument cannot meet the appropriately high standard for finding a cognizable BMI efficiency. In fact, five courts have already rejected similar attempts to rely on BMI as a justification for college football telecast restraints. Respondents are merely recycling the NCAA's BMI claim that was rejected by all three courts in Board of Regents and subsequently by both the trial and appeals courts in Regents of Univ. of Calif.[29] This attempt deserves the same fate.

Significantly, these same respondents relied on BMI in Regents of Univ. of Calif. to defend the crossover restriction in the 1984 ABC-CFA contract. The Ninth Circuit ruled BMI inapplicable because the contract lacked the sine qua non for a BMI joint selling arrangement -- unrestrained "individual competition, with the concomitant increase in output." 747 F.2d at 518. Rather, the court found that "just as the NCAA

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[29] In a third case, a court was confronted with allegations of college football telecast restraints, but declined to resolve the merits in a summary judgment proceeding. Ass'n of Independent Television Stations, Inc. v. CFA, 637 F. Supp. 1289 (W.D. Okla. 1986)("INTV").

television plan that fell before it," respondents' telecast contract suffered from "the dual infirmities of an intentional reduction in output along with the imposition of sharp restraints on individual school competition." Id.

The evidence in this case will confirm that the challenged agreements suffer from the same "dual infirmities" identified in Board of Regents and Regents of Univ. of Calif. and therefore are not justified by BMI packaging claims.

2. The Competitive Balance Claim

The CFA asserts that its appearance restraints are intended to promote competitive balance among the football programs of the CFA members. However, this claim is merely a rehashing of the balancing argument previously rejected in Board of Regents. If anything, the CFA's balance claim is even weaker than the NCAA's. The NCAA, at least, promulgates the rules that are essential for the product of college football to exist. The CFA does not.

As the Ninth Circuit observed in Regents of Univ. of Calif.:

> By any account, the purpose and effect of the horizontal restraints imposed by the CFA and the ABC-CFA contract have little, if any, bearing on the operative rules of collegiate football. Presumably, the essential ingredients of industry uniformity and product integrity are still being furnished by the same entity -- the NCAA. More to the point, if an industry depends on such an entity for its very sinews, logic suggests that there can be only one such entity per industry. With the NCAA having already occupied the field of "college football," the CFA and the ABC-CFA contract appear to constitute classic horizontal restraints unadorned by any organic relationship to the "character and quality of the 'product.'"

747 F.2d at 517 (citations omitted). Consequently, the CFA's balance argument cannot succeed.

3. The Increased Viewership Claim

Respondents claim that the challenged telecast agreements actually increase the total viewership of college football on television.[30] In support of this claim, they note that under the terms of the agreements every CFA school is free to televise every one of its football games. In fact, the agreements prevent the vast majority of CFA games from being shown on network television, limit the network appearances of the most attractive teams, require network appearances for some less attractive teams and virtually eliminate telecasts of competing games during key viewing hours. Consequently, the evidence will show that the purpose and effect of the agreements have been to reduce viewership and restrict viewer choice.

4. The Reduced Transaction Cost Claim

Respondents claim that transaction cost savings justify the restraints. Apparently, respondents argue that the CFA's joint sales arrangement achieves transaction cost savings, without which a game-of-the-week telecast series would not be possible. However, respondents cannot show that the restraints are at all related to transaction costs, nor that CFA involvement reduces

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[30] The CFA, in its answer, alleges that its telecast agreements "tend to increase the output of college football on television." CFA's Answer ¶¶ 13, 14. Since the CFA has previously asserted that viewership is the best measure of the output of college football telecasts, we assume that the CFA is still contending that the challenged agreements increase viewership.

those costs. In any event, as discussed above, the Supreme Court has held that restraints like the CFA's are not necessary for college football to be televised effectively.

5. **The Higher Ratings Claim**

Respondents claim that the challenged agreements are procompetitive because they increase the ratings of CFA-sponsored telecasts, enabling advertisers to make more efficient purchases of commercial time. In essence, the sponsored CFA game achieves higher ratings by excluding competing telecasts of other attractive CFA games.[31] The gain for the CFA-sponsored telecast is generated at the expense of reduced football viewing options for consumers, reduced commercial time for advertisers and reduced overall ratings (<u>i.e.</u>, viewership) for college football. Respondents' argument runs counter to the basic economic principle that efficiencies only arise when market output is increased. It therefore cannot be treated as a cognizable efficiency.

In sum, the evidence will show that none of the efficiency claims raised by respondents can withstand scrutiny. Because the challenged agreements are inherently suspect and have no competitive justification, they should be condemned as a violation of Section 5, without further analysis.

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31 For example, in the absence of a competing telecast, the sponsored CFA network game may garner a rating of 9. However, if another network airs a game during the same time slot, the CFA sponsored game might only achieve a 6 rating, even though both games together may attract a total of 12 rating points, thus generating a larger viewing audience than the CFA-sponsored game would alone.